Supreme Court of the United States.

Nos. 81, 82, 586, 587, 588.—October Term, 1905.

Nos. 81 and 82. The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiff in Error, vs. Nathan L. Miller, as Comptroller of the State of New York.	In Error to the Supreme Court of the State of New York.
Nos. 586, 587, 588. Same vs. Otto Kelsey, as Comptroller of the State of New York.	In Error to the Court of Appeals of the State of New York.

[May 28, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

These cases arise upon writs of certiorari, issued under the State law and addressed to the State Comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903 and 1904, respectively. The tax was levied under New York Laws of 1896, c. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.—Every corporation . . . incorporated . . . under . . . law in this State, shall pay to the State Treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount," at a certain rate, if the dividends amount to six per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than six per centum on the par value of the capital stock, [as was the case with the relator,] the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, &c., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital employed by it within this State."

The relator is a New York corporation owning or hiring lines without as well as within the State, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points

without as well as within the State, and over other lines as well as its own. The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the State. In short, by the familiar course of railroad business a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State. This contention the Comptroller disallowed.

The writ of certiorari in the earliest case, No. 81, with the return setting forth the proceedings of the Comptroller, Knight, and the evidence given before him, was heard by the Appellate Division of the Supreme Court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169. On appeal the Court of Appeals ordered the proceedings to be remitted to the Comptroller, to the end that further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the State, with directions that if it should be found that such was the fact the amount of the rolling stock so used should be deducted. 173 N. Y. 255. On rehearing of No. 81 and with it No. 82, before the Comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the State during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But in all of them evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the State, and also evidence of the car mileage outside and inside of the State, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year. The Comptroller refused to make any reduction of the tax, and the case being taken up again, his refusal was affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals on the authority of the former decision. 89 App. Div. 127. 177 N. Y. 124. The later cases took substantially the same course. The relator saved the questions whether the statute as construed was not contrary to Article 1, § 8, of the Constitution of the United States, as to commerce among the States; Article 1, § 10, against impairing the obligation of contracts; Article 4, § 1, as to giving full faith and credit to the public acts of other States; and the Fourteenth Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the Court of Appeals was wrong. Of course if the statute as construed is valid

under the Constitution, we are bound by the construction given to it by the State Court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the State during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the State during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the State all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But as it cannot be doubted, in view of the well known course of railroad business, that some considerable proportion of the relator's cars always is absent from the State, it would be unsatisfactory to turn the case off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the State cannot be taxed by New York. The car mileage within the State and that upon other lines without the State affords a basis of apportionment of the average total of cars continuously employed by other corporations without the State, and the relator's road mileage within and without the State affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the State. To tax on the total value within and without is beyond the jurisdiction of the State, a taking of property without due process of law, and an unconstitutional interference with commerce among the States.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local Courts it must be sustained by us. It is called a franchise tax in the Act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case. See

People v. *Morgan*, 178 N. Y. 433, 439. If it is a tax on any franchise which the State of New York gave, and the same State could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the State Court regards it.

Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211. *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. But it has not been decided and it could not be decided that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co.* v. *Kentucky*, May 21, 1906. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209.

It was suggested that this case is but the complement of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, and that as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the State bore to the whole number of miles over which its cars were run, so here in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But in that case it was found that the "cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State." The same cars were continuously receiving the protection of the State and, therefore it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.